BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the	)	
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING	)	Case No. E 94-95 H--0387-00-pe 97-12
v.	)	
SILVER ARROW EXPRESS, INC.,	)	
Respondent.	)	
JUNIOR V. MANIAGO, aka JUNIOR V. MANIAGU,	)	DECISION
Complainant.	)	

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. The Commission also designates the decision as a precedential decision of the Commission, pursuant to Government Code sections 12935, subdivision (h), and 11425.60.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code Civil Procedure section 1094.5. Any petition for

judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

Dated: November 5, 1997

FAIR EMPLOYMENT AND HOUSING COMMISSION

LYDIA I. BEEBE

PHYLLIS W. CHENG

T. WARREN JACKSON

MICHAEL M. JOHNSON

ANN-MARIE VILLICANA

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SILVER ARROW EXPRESS, INC.,	)	
Respondent.	)	
JUNIOR V. MANIAGO, aka JUNIOR V. MANIAGU,	)	PROPOSED DECISION
Complainant.	)	

Hearing Officer Jo Anne Frankfurt heard this matter on behalf of the Fair Employment and Housing Commission on September 17, 18, and 19, 1996, in Turlare, California and on August 5 and 6, 1997, in Visalia, California. At hearing in 1996, Leslie A. Lederman, then Staff Counsel, represented the Department of Fair Employment and Housing, assisted by Miljoy Linsao, Legal Intern. James A. Otto and Pamela Holmes, Staff Counsel, represented the Department of Fair Employment and Housing at the continued hearing in 1997. Debby R. Hambleton, Attorney at Law, represented Silver Arrow Express, Inc. Complainant and representatives of Silver Arrow Express, Inc. were present during all days of hearing.

The Commission held the record open for filing of post-hearing briefs. The parties timely filed post-hearing briefs, and the case was submitted on September 22, 1997.

After consideration of the entire record and all arguments, the Hearing Officer makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On January 24, 1995, Junior Maniago aka Junior Maniagu (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department) alleging that Silver Arrow Express, Inc. had, within the preceding year, denied complainant reinstatement because of his physical disability (post-bypass heart surgery and a ruptured disc), in violation of the Fair Employment and Housing Act (Act) (Gov. Code §12900 et seq.).

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On January 23, 1996, Nancy C. Gutierrez, in her official capacity as Director of the Department, issued an accusation against Silver Arrow Express, Inc. (respondent). On February 21, 1996, the Department issued a First Amended Accusation against Silver Arrow Express, Inc. Both accusations charged respondent with unlawful discrimination against complainant on the basis of physical disability or perceived physical disability, failure to reasonably accommodate complainant, and failure to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivisions (a), (i), and (k).

3. On June 30, 1997, the Department issued a Second Amended Accusation which charged that respondent also unlawfully refused to grant complainant medical leave, in violation of Government Code section 12945.2.

4. Respondent is a trucking business for the dairy industry. Respondent operates in California, employs over 50 people, and is an "employer" within the meaning of Government Code section 12926, subdivision (d), and Government Code section 12945.2, subdivision (c)(2)(A).

5. Complainant is an "eligible employee" within the meaning of Government Code section 12945.2, subdivisions (a) and (b).

6. Complainant has been a licensed commercial truck driver since 1975. He is licensed to drive a tractor, a vehicle commonly referred to as a "semi," and to pull double and triple tanker-trailers.

7. In 1989, Jack Sowash was respondent's Operational Manager and Dave Martin was respondent's Personnel and Safety Director.

8. At all times relevant herein, respondent required truck drivers to be examined by Valley Industrial and Family Medical Group (Valley Medical) prior to beginning employment or upon return from a medical leave. Valley Medical specializes in performing examinations consistent with federal Department of Transportation (DOT) regulations. DOT regulations require drivers to be medically examined and deemed medically qualified to work as a truck driver.

9. Dave Martin took a number of steps to ensure that Valley Medical was capable of adequately performing medical examinations for respondent. Martin met with many of Valley Medical's personnel, including its doctors and physician assistants Keith Garner and Octavio Penaloza. Martin also visited both of Valley Medical's clinics, observed their work, and reviewed their credentials. In addition, Martin asked Valley Medical personnel to review respondent's job descriptions and to observe respondent's truck drivers' job duties.

10. In or around April 1991, Dave Martin interviewed complainant for a truck driver position and authorized respondent to hire complainant. Valley Medical examined complainant and certified that he was medically qualified.

11. Thereafter, in April 1991, respondent hired complainant as an extra-board driver. Complainant's job involved driving a tractor-trailer containing dairy products to and from processing plants. As an extra-board driver, complainant did not have consistent runs, but instead was "on call" to take shifts as they came up.

12. As part of complainant's job duties, respondent required complainant to perform a pre- and post-trip vehicle inspections in a manner consistent with DOT regulations. These inspections involved, among other things, raising the truck's hood, climbing to the top of the tanker, and crawling under the truck for inspection.

13. Complainant's job responsibilities also involved dropping off one trailer and replacing it with another one, a procedure referred to as "drop and hook." This procedure requires a driver to crank the trailer's landing gear and can entail lifting or exerting effort of over 25 pounds, particularly if the trailer is not empty or has been parked on uneven ground. Because the driver doing the "drop and hook" picks up a different driver's trailer, ordinarily neither respondent nor the "drop and hook" driver has control over where the trailer is parked or how full it is. Additionally, respondent does not necessarily have advance notice of a "drop and hook" and therefore cannot predict whether a driver will have to perform this job duty on his or her shift.

14. Complainant also was responsible for doing "doubles," which means hauling two trailers. When doing a "drop and hook" on "doubles," the driver can be required to push and/or pull the converter gear, which has a draw bar of approximately 75 pounds. As with other "drop and hooks," the procedure is more difficult to do when the trailer is not on level ground.

15. In early May 1991, complainant experienced chest pains while driving for respondent. Complainant finished his shift and informed respondent's dispatcher that he needed to see a doctor. Thereafter, complainant's doctors advised him to have coronary artery bypass surgery to correct blocked arteries.

16. On May 22, 1991, respondent sent a letter to complainant, terminating his employment, effective May 21, 1991. On May 29, 1991, complainant had the surgery.

17. In October 1991, complainant received a written medical release from Dr. Arcot, a cardiologist, allowing him to return to work beginning October 18, 1991. While the release contained no restrictions, complainant and his wife were under the impression that the doctor had placed a 25-pound lifting restriction upon complainant following surgery.

18. Beginning in 1992, Jack Sowash became respondent's Vice President, in charge of managing respondent's entire operation.

19. By January 10, 1992, Dave Martin had received a copy of Dr. Arcot's October 1991, medical release. Respondent sent complainant to Valley Medical and on January 20, 1992, Keith Garner, one of the physician's assistants at Valley Medical, examined complainant. During the examination, complainant told Garner that he had a 25-pound lifting restriction.

20. On January 31, 1992, Dr. Arcot wrote a letter to Valley Medical responding to specific Valley Medical questions. Dr. Arcot stated that complainant could drive a truck up to 10 hours per day, climb up and down a ladder, climb under the trailer, and lift up to 50 pounds, if needed.

21. On February 4, 1992, Keith Garner sent Dave Martin a Valley Medical report which stated that Dr. Arcot had now medically released complainant to full duty. In the report, Garner stated that, based upon complainant's examination and Arcot's release, complainant was able to perform as a truck driver for respondent.

22. On February 27, 1992, respondent reinstated complainant as a truck driver.

23. In 1992, a number of trucking companies, including respondent, developed a truck driver job description which incorporated the DOT requirements. Each company then tailored the job description to its specific requirements. On April 1, 1992, respondent adopted a specific job description for its commercial truck drivers. Respondent's job description lists "essential physical requirements" which include: climbing up and down the ladder on the trailer tanker; pushing and/or pulling a converter gear, "requiring an undetermined amount of strength, since the bar weighs approximately 75 pounds"; pulling open the engine cover requiring approximately 25 to 45 pounds of weight; cranking landing gear of approximately 150 to 200 pounds; lifting/carrying processing plant samples (35-75 pounds); and lifting/carrying a converter gear draw bar (approximately 75 pounds), if necessary to change the trailer.

24. In May or June 1994, complainant again experienced chest pains and went to the Veterans' Administration Hospital. Cardiologist Dr. Lakhjit Sandhu medically cleared complainant to return to work without restrictions. On June 8, 1994, the Department of Veterans' Affairs wrote a letter to respondent which confirmed Dr. Lakhjit's release without restrictions; respondent received the letter by June 20, 1994. Valley Medical also examined complainant and released him to work without restrictions. Respondent returned complainant to work on June 30, 1994.

25. In late 1994 and early 1995, respondent's work load required drivers to do more "drop and hooks," with some drivers doing them every day. Given the increased number of "drop and hooks," it was impossible for respondent to eliminate assigning "drop and hooks" to extra-board drivers.

26. On September 9, 1994, at the end of his shift, complainant experienced numbness, tingling and pain in his left arm and shoulder. He told a dispatcher named Roger, who told complainant to have it medically examined. As of September 9, 1994, complainant took a disability leave.

27. During complainant's disability leave, he had his heart checked by Dr. Saraswathy Balasingam, his new cardiologist. Balasingam found no problem with complainant's heart and cleared him to return to work with a written release dated December 27, 1994. Under the restrictions portion of the release, Dr. Balasingam stated, "same as before." Complainant was under the impression that "same as before" referred to the 25-pound lifting limitation following his 1991 heart surgery. Complainant gave the release to respondent.

28. During his disability leave, complainant experienced back pain and saw a doctor who concluded that he had early stage lumbar deterioration and recommended surgery. Complainant sought two more medical opinions; neither doctor recommended surgery or placed any physical limitations on complainant's activities. One of these doctors, an orthopedist, gave complainant a written release stating that complainant could return to work without restriction as of January 2, 1995. Complainant gave this release to respondent.

29. On January 2, 1995, respondent sent complainant to Valley Medical for clearance to return to work. At Valley Medical, physician assistant Octavio Penaloza examined complainant. Complainant told Penaloza that he had a 25-pound lifting limitation. While complainant believed he had this restriction based upon the 1991 surgery, he also did not think that the restriction had prevented him from working for respondent as a truck driver and believed that respondent had always been aware of the restriction. After hearing about the restriction, Penaloza told complainant that he needed a written medical release from his doctors before Valley Medical could release him to return to work.

30. Thereafter, complainant had several telephone discussions with Penaloza, explaining that he could do the job and asking for medical clearance. Penaloza also spoke with Dave Martin, saying he could not remove the 25-pound restriction until he received a written release from complainant's doctor. Complainant's wife also spoke with Martin, explaining that complainant had always had the 25-pound weight restriction, but that complainant was able to do the job.

31. During or following his January 2, 1995 Valley Medical examination, complainant never gave Penaloza or Valley Medical any medical release for either his heart or back condition.

32. In January 1995, Jack Sowash received Valley Medical's report on complainant, which stated that complainant's doctor had released him with a "no heavy lifting" restriction due to his heart condition. The report also stated that due to complainant's "heart bypass and back problems," Valley Medical recommended no lifting, pushing, or pulling over 25 pounds. Sowash then contacted Dave Martin to discuss whether respondent could accommodate complainant. They decided that it would not be practical to have another driver accompany complainant and ultimately concluded that they could not accommodate complainant as a driver because of the 25-pound restriction. Martin also sought legal advice on the issue.

33. On January 30, 1995, Jack Sowash wrote a letter to complainant. The letter stated:

> We have received the notice from your doctor releasing you to work with the restriction of no lifting over 25 pounds. We have reviewed your job of commercial driver in an attempt to determine if a reasonable accommodation was possible. We also reviewed whether there were other open positions for which you are qualified. Unfortunately, it is not possible to accommodate your restriction due to the fact that lifting over 25 pounds is an essential function of your job. Additionally, we have no other positions available at this time.
>
> If you are interested in a position as a dispatcher in the future, please let us know and we will keep you in mind for such a future position.

34. After sending the January 30, 1995, letter, Jack Sowash never heard from complainant, either by telephone or writing.

DETERMINATION OF ISSUES

Liability

The Department asserts that respondent's conduct constitutes unlawful physical disability discrimination under the Act, violates the California Moore-Brown-Roberti Family Rights Act (CFRA), and constitutes an unlawful failure to prevent discrimination.1/ Respondent will be found liable if we determine, first, that its actions constitute discrimination under the Act, and if so, that this discrimination is not rendered lawful by an affirmative defense.

1/ In its Second Amended Accusation, the Department alleges that respondent failed to take all reasonable steps necessary to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (i). At hearing, however, the Department did not present evidence specific to this allegation and did not address it in closing argument. Therefore, we decline to find a violation.

A. Disability Discrimination

1. Discrimination

The Act provides that the term "physical disability" includes, among other things, having a physiological disease or disorder which: 1) affects the musculoskeletal or cardiovascular system, and 2) limits an individual's ability to participate in major life activities. (Gov. Code §12926, subd. (k)(1).) "Being regarded as having or having had" such a disease or disorder also constitutes a "physical disability" under the Act. (Gov. Code §12926, subd. (k)(3).) Thus, the Act forbids discrimination against individuals who have a "physical disability" or who are regarded as "having or having had" a physical disability. (Gov. Code §§12926, subd. (k)(3), and 12940, subd. (a).)

Here, the evidence established that respondent regarded complainant as having a physiological condition which constitutes a "physical disability" within the meaning of the Act. (Cassista v. Community Foods (1993) 5 Cal.4th 1050.) The evidence showed that respondent believed the 1995 Valley Medical report, which expressly recommended that complainant be restricted from lifting, pushing, or pulling over 25 pounds due to "heart bypass and back problems." Complainant's heart and back conditions affected, respectively, the cardiovascular and musculoskeletal systems and, by Valley Medical's own description, also limited complainant's ability to participate in major life activities involving lifting, pulling or pushing over 25 pounds. Thus, by believing the information contained in the 1995 Valley Medical report, respondent regarded complainant as having a disability covered by the Act.

The Department argues that respondent discriminated against complainant under the Act by refusing to reinstate him to his position as truck driver because of his perceived physical disability. (Gov. Code §12940, subd. (a).)

Discrimination is established if we determine that a preponderance of all the evidence demonstrates a causal connection between a complainant's perceived physical disability and an adverse action taken against him by respondent. The evidence need not demonstrate that complainant's perceived disability was the sole or even the dominant cause of his adverse treatment. Discrimination is established if the perceived disability was at least one of the factors that influenced respondent. (DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05 [1988-89 CEB 4]; DFEH v. Kingsburg Cotton Oil Co. (1984) FEHC Dec. No. 84-30, at p. 21 [1984-85 CEB 11]; Cal. Code of Regs., tit. 2, §7293.7.)

Here, the evidence showed that complainant's perceived disability formed the basis for adverse action by respondent. It is undisputed that respondent's reliance upon the restriction in the 1995 Valley Medical report led to respondent's refusal to reinstate complainant to his commercial truck driver position. We, therefore, conclude that respondent discriminated against complainant because of his perceived physical disability within the meaning of Government Code section 12940, subdivision (a).

2. Affirmative Defense

Respondent raises an affirmative defense, which, if proven, will relieve it of liability. Respondent must establish any affirmative defense by a preponderance of the evidence. (Sterling Transit Co. v. Fair Employment Practices Com. (1981) 121 Cal.App.3d 791, 796.)

Respondent argues that it reasonably relied upon the 1995 Valley Medical report and that the report's recommended 25-pound restriction precluded complainant from performing the essential functions of the truck driver job. The Act explicitly states that an employer is excused from discharging an employee with a disability where the employee is unable to perform his or her essential duties, even with reasonable accommodations because of the disability. (Gov. Code, §12940, subd. (a)(1).) Further, our regulations (Cal. Code of Regs., tit. 2, §7293.8, subd. (b)) provide:

> It is a permissible defense for an employer or other covered entity to demonstrate that, after reasonable accommodation has been made, the applicant or employee cannot perform the essential functions of the position in question because of his or her disability.

Respondent asserts that at the time complainant sought reinstatement in January 1995, several essential truck driver job functions required lifting, pushing or pulling over 25 pounds. In support of this position, respondent proffered its job description for commercial truck driver. The job description, as detailed in Finding of Fact 23, contains a number of physical requirements for this position which entail considerable exertion in excess of 25 pounds.

To prove that these physical requirements are essential duties of the truck driver job, respondent also offered the testimony of Vice-President Jack Sowash, and Scott Howarth, an ex-employee of respondent. Each witness had approximately 30 years of trucking experience and was familiar with the job duties of respondent's drivers. Sowash confirmed that respondent's commercial truck drivers needed to lift 25 pounds or more to do

the job. Howarth corroborated that several of the job's requirements could entail lifting, pushing, or pulling over 25 pounds.

The Department argues, however, that the job description does not accurately state the essential functions, offering the testimony of complainant and two co-workers, Maurine Elliot and Donald Morris. While Elliot testified that she could adequately perform the truck driver job functions with little physical effort, complainant conceded that the "drop and hook" involved physical work and put an extra strain on drivers.

Significantly, Department witness Donald Morris corroborated much of respondent's position. Morris is a union shop steward, has been a truck driver since 1968, and at the time of hearing had worked for respondent for nine years. After reviewing respondent's commercial truck driver job description, Morris testified that, with one exception, the description accurately reflected the essential job requirements. In light of all of this evidence, we conclude that the ability to lift, push or pull over 25 pounds is an essential job function for the position of commercial truck driver.

Respondent argues that, with the Valley Medical restriction, complainant could not perform the essential functions of the job. We agree. Jack Sowash and Dave Martin testified that they reviewed the essential job requirements for truck driver and concluded that the 25-pound restriction would preclude complainant both from performing the essential duties and complying with DOT regulations. Their conclusion is supported by other evidence in the record which showed that on any work day, any driver might need to do a "drop and hook," a procedure that could entail more than 25 pounds of exertion. During late 1994 and early 1995, drivers were doing more "drop and hooks" than they previously had done, with some drivers doing them every day. Additionally, the evidence showed that a 25-pound restriction might preclude complainant from performing some pre- and post-trip inspection duties, such as climbing and lifting.

The Department argues, however, that even if respondent believed that complainant had a 25-pound restriction, respondent did not properly consider whether complainant could have performed the commercial truck driver duties with reasonable accommodation. Sowash and Martin also testified that they talked about accommodating complainant in the truck driver position, but concluded that the only accommodation would be to hire an additional driver, which they found to be unfeasible. Under the Act, respondent was not required to hire an additional driver, because reasonable accommodation does not include supplanting the position in question. (Cf. Ackerman v. Western Elec. Co., Inc.

(9th Cir. 1988) 643 F.Supp. 836, 851, rev'd on other grounds, 860 F.2d 1514; DFEH v. City of Anaheim Police Department (1982) FEHC Dec. No. 82-08, at p. 11 [1982-83 CEB 4]).) Thus, we conclude that respondent considered accommodation but, in light of the restriction in the 1995 Valley Medical report, appropriately determined that complainant could not have performed the essential functions of the job of commercial truck driver, even with accommodation.

The Department further argues that respondent should have done more to determine whether complainant had, in fact, a weight lifting restriction. The Department suggests that further inquiry would have led respondent to discover that complainant could do the job, regardless of his medical history. The Department maintains that respondent should not have relied upon the 1995 Valley Medical report but, instead, should have pursued other avenues, such as reviewing its own personnel files which contained recent medical releases, sending complainant to a cardiologist for clarification, or engaging in more discussion with complainant.

We find the Department's argument unpersuasive. Respondent had investigated Valley Medical by reviewing its credentials, visiting its clinics, and meeting with its personnel. Additionally, respondent knew that Valley Medical was familiar with both respondent's job requirements and the pertinent DOT regulations. Given these facts, respondent's reliance upon Valley Medical's report was reasonable. (See, e.g., Cook v. Dept. Of Labor 688 F.2d 669, 670 (9th Cir. 1982) (per curiam), cert. den. 464 U.S.832, 104 S.Ct. 112 (1983); Pesterfield v. Tennessee Valley Authority 941 F.2d 437, 441 (6th Cir. 1991).) Additionally, it was complainant who told Valley Medical he had a restriction and who then failed to give Valley Medical any written medical verification to the contrary, despite his knowledge that his job was on the line if he did not do so.

For these reasons, we conclude that respondent has established an affirmative defense in that it reasonably relied upon the 1995 Valley Medical report and, in light of the report's weight restrictions, appropriately concluded that complainant could not perform the essential functions of the truck driver job, even with accommodation. We, thus, find that there is no violation of Government Code section 12940, subdivision (a).1/

2/ The Department also alleges a failure to accommodate under Government Code section 12940, subdivision (k). For the reasons discussed above, we find that there was no violation of that provision.

B. California Moore-Brown-Roberti Family Rights Act (CFRA)

The Department also asserts that respondent discriminated against complainant by failing and/or refusing to afford complainant his rights under the California Moore-Brown-Roberti Family Rights Act (Gov. Code §§12945.1 and 12945.2) (CFRA). CFRA requires a covered employer to allow an eligible employee to take a family care or medical leave for up to 12 workweeks in any 12-month period.

The evidence was undisputed that, at all relevant times, respondent was a covered employer, employing more than 50 persons, and complainant was an eligible employee. Additionally, complainant's heart condition constitutes a "serious health condition" within the meaning of CFRA, because it involved continuing treatment and supervision by a health care provider. (Gov. Code §12945.2 (c)(7)(B).)

The Department asserts that complainant took CFRA leave for his heart condition beginning September 9, 1994, and was able to return to work November 1, 1994, within the 12-week CFRA period. The record in this case does not support this position. The Department did not elicit clear testimony about when complainant was medically able to return to work. It introduced a return-to-work release signed by Dr. Balasingam, complainant's cardiologist, stating that complainant could have returned to work as of November 1st. The release, however, was not signed by Dr. Balasingam until December 24, 1994, a date well beyond the 12-week CFRA entitlement. Moreover, complainant's orthopedist did not release him to return to work until January 1995. In light of this evidence, we find that the Department has not established that complainant was physically able to return to work 12 weeks after his CFRA leave began, and we therefore conclude that respondent did not violate CFRA.

ORDER

The accusation is dismissed.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers should be served on the Department, the Commission, respondent and complainant.

Dated: October 22, 1997

_____

JO ANNE FRANKFURT
Hearing Officer

DECLARATION OF SERVICE BY MAIL OR PERSONAL DELIVERY

I, Suzanne Ng, DECLARE:

I am a citizen of the United States, over eighteen (18) years of age, and not a party to the within cause; my business address is 1390 Market Street, Suite 410, San Francisco, California, 94102; I served a copy of the DECISION (DFEH/Silver Arrow Express, Inc. (MANIAGO) on each of the following, by placing same in envelopes addressed respectively as follows:

James Otto, Staff Counsel
Department of Fair Employment
and Housing
611 West 6th Street, Ste. 2850
Los Angeles, CA 90017

Debby R. Hambleton, Esq.
Rexon, Freedman,
Klepetar & Hambleton
12100 Wilshire Blvd., #730
Los Angeles, CA 90025-7107

Junior V. Maniago
113 North Valente
Earlimart, CA 93219

Each said envelope was then, on said date, sealed and deposited in the United States mail at San Francisco, California, the County in which I am employed, with the postage thereon fully prepaid or personally delivered by me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 7, 1997, at San Francisco, California.

_____

Suzanne Ng